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IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1671

WILLIAM J. MERTENS, ALEX W. BANDROWSKI,
JAMES A. CLARKE, and RUSSELL FRANZ,
v. *Petitioners,*

HEWITT ASSOCIATES,
an Illinois Partnership,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**BRIEF *AMICUS CURIAE* OF AMERICAN SOCIETY OF
PENSION ACTUARIES IN SUPPORT OF RESPONDENT**

INTRODUCTION

The American Society of Pension Actuaries ("ASPA") submits this brief *amicus curiae* to urge the Court to affirm the holding below that the Employee Retirement Income Security Act ("ERISA") provides no private cause of action for money damages against a nonfiduciary, generally, and against an actuary, in particular.

INTEREST OF ASPA

ASPA is a nonprofit organization whose purpose is to educate pension plan professionals and to preserve and enhance the private pension system. For example, ASPA sponsors numerous educational programs and is a cospon-

sor of the examinations of the Joint Board for the Enrollment of Actuaries, which a candidate must pass in order to attain Enrolled Actuary status.¹ ASPA recently participated as an *amicus curiae* in *Patterson v. Shumate*, 504 U.S. —, 119 L.Ed. 2d 519 (1992), in support of the position ultimately upheld by this Court.

The membership of ASPA consists of nearly 3,000 individuals who provide actuarial, consulting, and administrative services to approximately 30% of the tax-qualified retirement plans in the United States. The members of ASPA, like the pension plans they serve, are located throughout the United States. These plans are representative of all of the nation's tax-qualified retirement plans, which cover tens of millions of American workers.

Because of the broad range of experience of ASPA's constituency, ASPA believes that it is uniquely qualified to state the position of actuaries and their fellow professionals who provide services to the hundreds of thousands of fiduciaries charged with operating retirement plans and to the hundreds of thousands of large and small businesses that maintain these plans.

Congress, familiar with the way in which employee benefit plans operate, enacted ERISA in order to ensure "the continued well-being and security of millions of employees and their dependents . . . directly affected by [employee benefit] plans," 29 U.S.C. § 1001(a). To accomplish this end, Congress established a detailed list of causes of action and a panoply of remedies—none of which provides for a private cause of action for money damages against a nonfiduciary. As a national representative of those nonfiduciaries who provide services to employee benefit plans, ASPA submits that reversal of the decision below would serve only to escalate the costs

¹ ASPA's work has been instrumental in redesigning the examinations offered by the Joint Board for the Enrollment of Actuaries. See Proposed JEBA Reg. Part 901, Enrolled Actuary Examinations (Fed. Reg. Feb. 28, 1983).

of maintaining and administering plans, rather than achieving any goal established by the Congress.

SUMMARY OF REASONS FOR AFFIRMANCE

In fashioning ERISA, Congress chose to differentiate between fiduciaries and nonfiduciaries. Congress established detailed standards of fiduciary conduct. Congress expressly chose to provide a private cause of action for money damages against fiduciaries for their own breaches, as well as a private cause of action for money damages against fiduciaries who participate in the breaches of their cofiduciaries.

The drafters of ERISA considered whether to include actuaries within the definition of fiduciary, thereby subjecting actuaries to ERISA's fiduciary standards and exposing them to claims for money damages, if they failed to meet those standards. As reflected in the plain language of ERISA—as well as its legislative history and implementing regulations—the statute forged from the Congressional deliberations does not include actuaries within the definition of fiduciary or within the category of those against whom money damages can be obtained. On the other hand, ERISA does establish detailed duties for actuaries and it provides for the establishment of the Joint Board for the Enrollment of Actuaries to set and maintain standards for the actuarial professional. Moreover, ERISA does include, in detail, the obligations of actuaries (and other parties in interest). And, ERISA does include (1) a private cause of action for equitable relief against parties in interest (including actuaries) and (2) a governmental right to impose an excise tax on parties in interest (including actuaries) who engage in transactions prohibited by the statute.

Inasmuch as Congress chose not to measure the actions of actuaries under ERISA's fiduciary provisions, and Congress chose not to legislate a private cause of action for money damages against actuaries, we respectfully

submit that this Court should not choose to do so, either. See, e.g., *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985) (ERISA held not to provide a cause of action for extracontractual damages); *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 546 (1984) (Investment Company Act of 1940 held not to provide "unmentioned" intracorporate procedural prerequisite to filing complaint).

REASONS FOR AFFIRMANCE

I. CONGRESS DISTINGUISHED BETWEEN THE STANDARDS OF CONDUCT OF FIDUCIARIES AND ACTUARIES.

Congress recognized that one step in the process of those who select the funding methods and assumptions meet high professional standards. "The Secretary is . . . authorized to establish standards and qualifications for actuaries. This is a major innovation and indispensable to the effective enforcement of the funding standards and operation of the plan termination insurance program. The Committee is unaware of any significant licensing procedures for actuaries at either the state o[r] federal level. . . ." S. Rep. No. 127, 93rd Cong., 1st Sess. at 17 (1973), reprinted in *I Legislative History of the Employee Retirement Income Security Act of 1974* at 17 (1976) (hereinafter referred to as "*Legis. Hist.*"). Congress also stressed uniform standards for the qualification of actuaries:

[T]he Committee bill . . . provides that the Secretary of the Treasury is to establish qualifications for actuaries and is to certify for practice before the Internal Revenue Service the persons who meet these standards. For purposes of such certification, examination may not be needed for individuals who have demonstrated sufficient pension experience or satisfactory performance in a rigorous examination system maintained by professional societies.

Id. at 24, reprinted in *I Legis. Hist.* at 1092. See S. Rep. No. 127, 93d Cong., 1st Sess. at 57, reprinted in *I Legis. Hist.* at 1125.

The importance of well-trained actuaries to the policy goals of ERISA was a recurring theme for ERISA's drafters:

[T]here is no existing government regulation of the actuarial profession as there is, for example, for lawyers and accountants. To resolve this problem, the committee's bill provides that the Secretary of the Treasury is to establish rules and regulations for actuaries to practice before the Internal Revenue Service and is to enroll persons who meet the standards of competence for practice before the Service (with regard to actuarial matters only).

Id. at 68, reprinted in *I Legis. Hist.* at 1136. See H. Rep. No. 779, 93d Cong., 2d Sess. at 91-92 (1974) reprinted in *II Legis. Hist.* at 2680-81.

ERISA, at Section 3042, "reflects Congress' determination that only competent actuaries should be permitted to service private pension plans. To this end, Congress directed the Secretaries of Labor and the Treasury to establish a Joint Board that would superintend a process of certifying actuaries for competence." *Tabor v. Joint Board for Enrollment of Actuaries*, 556 F.2d 705, 707 (D.C. Cir. 1977). The Joint Board for the Enrollment of Actuaries, established under ERISA Section 3041, is composed of three members appointed by the Secretary of the Treasury and two appointed by the Secretary of Labor. 20 C.F.R. § 900.3 (1991). ERISA Section 3042(b) provides that the Joint Board may (after notice and an opportunity for a hearing) suspend or terminate the enrollment of an individual who fails to discharge his/her duties or does not satisfy the requirements for enrollment. Under ERISA, only enrolled actuaries can determine plan funding methods and assumptions for defined benefit pension plans; only an enrolled actuary can prepare the actu-

arial statement that must be filed annually with the Secretary of Labor for defined benefit pension plans. See ERISA § 103(a)(4)(A).

At one point in the Congressional debate, consideration was given to imposing fiduciary duties on enrolled actuaries:

The assumptions utilized in determining plan liabilities and assets and the choice of appropriate funding methodology are crucial to adequate funding of a plan. The actuaries performing these plan services will fall within the definition of fiduciary and will be held to the duties imposed on such individuals, including personal liability for any breach of such duties. The Committee is convinced that notwithstanding the threat of personal liability, additional constraints are necessary to establish directly the professional qualifications of those who perform these vital services. In applying the standards of qualification outlined in the bill, the Secretary should be mindful of the difficult and sometimes subjective judgments to be made by actuaries and should take care that those who qualify be prepared to perform all of the tasks that may be required of an actuary under the bill. The prior restraints imposed on actuaries in the form of enrollment by the Secretary, as well as personal liability for failure to meet their responsibilities, impose a substantial burden on the actuary. The Committee is convinced that such burden is consistent with the importance of the function performed by these fiduciaries.

(Cong. Rec. Feb. 25, 1974) (comments of Rep. Perkins), reprinted in II *Legis. Hist.* at 3309.

While this view of the statute was expressed by Representative Perkins, who was Chairman of the House Committee on Education and Labor, no such view appears to have been expressed by the other members of his Committee or by any of the members of the House Ways and Means Committee, which also was charged with drafting ERISA.

Notwithstanding Representative Perkins' early view, the Conference Committee Report accompanying ERISA adopted a more limited view of the duties of professionals generally, and actuaries specifically, than that contained in Representative Perkins' statement. "After the two House committees charged with drafting ERISA had consolidated their efforts and the House bill was passed, a House-Senate Conference Committee was named, which included Representative Perkins. Explaining *the same language* Representative Perkins discussed in the comments in the [Congressional] Record excerpted above, the Conference Report observed that . . . 'the ordinary functions of consultants and advisers (other than investment advisers) may not be considered as fiduciary functions. . . .' " *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 536 (7th Cir. 1991) (emphasis in original), quoting H. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 323 (1974). The Conference Committee Report represents the final statement of the terms agreed upon by both houses of Congress, and "next to the statute itself, it is the most persuasive evidence of the Congressional intent behind the enactment of the statute." *Davis v. Lukhard*, 788 F.2d 973, 981 (4th Cir.), cert. denied, 479 U.S. 868 (1986).

Moreover, it is the language of the Conference Committee Report, not the early comments of Representative Perkins, that is reflected in the Department of Labor regulations issued shortly after the passage of ERISA. Those regulations state that actuaries, attorneys, accountants, and consultants, when "performing their usual functions will ordinarily not be considered fiduciaries. . . ." 29 C.F.R. § 2509.75-5. The judiciary has consistently upheld the proposition that these kinds of service providers to employee benefit plans are not fiduciaries. *E.g.*, *Pappas v. Buck Consultants*, 923 F.2d 531 (7th Cir. 1991); *Anoka Orthopaedic Associates, P.A. v. Lechner*, 910 F.2d 514, 517 (8th Cir. 1980); *Yeseta v. Baima*, 837 F.2d 380, 385 (9th Cir. 1988).

Thus, it is clear not only that Congress chose to distinguish between the duties of fiduciaries and the duties of actuaries, but also that this distinction has been recognized by the Department of Labor and the judiciary.

II. ERISA CONTAINS NO PRIVATE CAUSE OF ACTION FOR MONEY DAMAGES AGAINST A NON-FIDUCIARY.

Claims for money damages for fiduciary breaches and for knowing participation in a fiduciary breach arise from ERISA Section 409. The plain language of that Section limits its scope to remedies against "[a]ny person who is a fiduciary."² This Court has highlighted the plain meaning of ERISA Section 409 and stressed the fact that Part 4 of Title I of ERISA—where Section 409 has been deliberately placed by the Congress—is entitled "Fiduciary Responsibility." See *Russell*, 473 U.S. at 140-43. Moreover, ERISA expressly addresses liability for knowing participation in a breach of a fiduciary duty. The applicable provision is ERISA Section 405 which—by its

² In recently reiterating the significance of the plain meaning rule of statutory construction, this Court stressed that the "plain language of ERISA is our determinant," *Patterson v. Shumate*, 504 U.S. —, 119 L.Ed.2d 519, 526 (1992). The preference for literalism in determining the meaning of a statute is based on the established doctrine of separation of powers. The federal judiciary owes fidelity to the will of the Congress. What the Congress sets forth in the text of a statute "is considered the best evidence of the legislative intent or will. Therefore the courts are bound to give effect to the expressed intent of the legislature." 2A N.J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1991). This Court has long held that "the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 490 (1917). This is the plain meaning rule, which has been expressed in many ways, all of which mean that, if the statutory language is clear, there should be no excursions outside the statute to search for a different meaning.

terms—is limited to liability for fiduciaries. It does not provide for liability for nonfiduciaries.

Thus, Congress addressed in detail the issues of liability for fiduciary breaches and liability for participation in fiduciary breaches. Congress cannot be said to have overlooked these issues. Although Congress did not choose to provide for the assessment of money damages against nonfiduciaries in connection with a fiduciary's violation of ERISA, Congress did expressly address the liability of nonfiduciaries, *i.e.*, parties in interest,³ when it was drafting ERISA: "[T]he committee bill . . . imposes sanctions for prohibited transactions upon the parties in interest and fiduciaries who engage in these transactions in place of the sanctions now imposed on the employee benefit trusts. Under the bill, the parties in interest and fiduciaries who engage in a prohibited transaction are to be subject to a two-level excise tax on the amount involved in the prohibited transaction." S. Rep. No. 383, 93d Cong., 1st Sess. (1973), reprinted in 1974 U.S.C.C.A.N. 4890, 4978.

In their deliberations, the drafters of ERISA also considered the liability for violations of ERISA, where the nonfiduciary—as opposed to the fiduciary—benefitted from the violation. "The committee believes that where the party in interest and not the fiduciary benefits from the prohibited transaction, primary responsibility under the excise tax provisions should be on the party in interest and not on the fiduciary." *Id.* at 4980. Nowhere in these deliberations did Congress even hint at a private cause of action for money damages against a non-fiduciary.

These issues were also addressed in the Conference Committee Report: "The conference substitute establishes rules governing the conduct of plan fiduciaries

³ The statutory definition of the term "party in interest" includes service providers, ERISA § 3(14)(A), (B).

under the labor laws (title I) and also establishes rules governing the conduct of disqualified persons (who are generally the same people as 'parties in interest' under the labor provisions) with respect to the plan under the tax laws (title II) The labor law provisions apply rules and remedies *similar to those under traditional trust law to govern the conduct of fiduciaries*. The tax law provisions apply an excise tax on disqualified persons who violate the new prohibited transaction rules. . . ." H. Conf. Rep. 1280, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5076 (emphasis supplied). Thus, Congress differentiated between fiduciaries and nonfiduciaries and between the liabilities of each. Congress expressly recognized that the money damage remedies were to be applied to fiduciaries, not to nonfiduciaries.

"[T]he authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt. The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Northwest Airlines v. Transport Workers Union of America*, 451 U.S. 77, 97 (1981). This Court has recognized on numerous occasions that ERISA is such a statute. *E.g.*, *Pilot Life Insurance Co. v. Dedcaux*, 481 U.S. 41 (1987); *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980).

The breadth and degree of detail in ERISA has led this Court to express its reluctance "to tamper with an enforcement scheme crafted with such evident care . . ." [W]here a statute [such as ERISA] expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. at 147 (1985) (citations omitted). This Court has repeatedly refused to

"engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *Thompson v. Thompson*, 484 U.S. 174, 187 (1988), *quoting California v. Sierra Club*, 451 U.S. 287, 297 (1981).

ERISA and its legislative history are replete with references to and consideration of the duties, responsibilities, and liabilities of parties in interest generally, and actuaries, in particular. However, Congress affirmatively chose not to saddle actuaries with the duties and concomitant liabilities of fiduciaries. ERISA Sections 502(i) and 502(l) are the monetary deterrents to parties in interest—including actuaries—that Congress chose to federalize. These Sections impose governmental sanctions on the nonfiduciaries; they do not create a private cause of action for money damages.

While the Court may have the authority to fashion "appropriate equitable relief," under ERISA Section 502 (a) (3) (B), using the principles of trust law or the concept of federal common law, this relief is limited in its application to specific causes of action. We submit that neither ERISA nor its legislative history invites the judicial creation of new causes of action. This point is driven home by the legislative history of recent amendments to ERISA, which were enacted as part of the 1989 Omnibus Budget Reconciliation Act ("OBRA"). During the Congressional deliberations that resulted in the passage of OBRA, Congress was presented with an ERISA amendment to provide for a private cause of action for money damages against a nonfiduciary who participated in a fiduciary breach. *See* H. Rep. No. 247, 101st Cong., 1st Sess., *reprinted in* 1989 U.S.C.C.A.N. 1969-70. This was referred to as the *Nieto* amendment, because its express purpose was to overrule the Ninth Circuit's holding in *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988), that ERISA provides no basis for such a private cause of action against nonfiduciaries. Congress refused to enact the *Nieto* amendment.

However, as part of OBRA, Congress did add Section 502(l) to ERISA, under which Section the Department of Labor was provided for the first time with the authority to assess a monetary sanction against a non-fiduciary who participates in a fiduciary breach. More importantly for the instant case, Congress recognized that it also had to use OBRA to amend ERISA Section 502(a)(6), in order to provide the Secretary of Labor with a cause of action to collect this new Section 502(l) sanction. Even though the Petitioners appear to have blurred the difference between remedies and causes of action, Congress clearly recognizes that there is a difference.⁴

Although “[a] ‘cause of action’ may mean one thing for one purpose and something different for another,” *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 68 (1933), there is no question that remedies and causes of action are two different concepts. “The law of judicial remedies concerns itself with the nature and scope of the relief to be given a plaintiff once he has followed appropriate procedure in court and has established a substantive right. The law of remedies is thus sharply distinguished from the law of substance and procedure.” D.B. Dobbs, *Handbook on the Law of Remedies* at 1 (1973).

On the other hand, a cause of action is a “state of facts which would entitle a person to sustain an action and to seek a judicial remedy on his behalf.” *Woodfork v. Marine Coods & Stewards Union*, 642 F.2d 966, 971 (5th Cir. 1981). Put another way, “[a] cause of action consists of ‘a single core of operative facts’ which give rise

⁴ In a similar vein, the legislative history of OBRA states: “It remains the intent of Congress that the courts use their power of [sic] fashion legal and equitable remedies that not only protect participants and beneficiaries but deter violations of the law as well.” 1989 U.S.C.C.A.N. at 3036. This legislative history does not mention the existence of any Congressional intent to have a private cause of action against nonfiduciaries for money damages. How could it, where the Congress had refused to enact the *Nieto* amendment?

to a remedy.” *Alexander v. Chicago Park District*, 773 F.2d 850, 854 (7th Cir. 1985) (citation omitted). See, e.g., *Proctor v. Gissendaner*, 579 F.2d 876, 879 n.5 (5th Cir. 1978).

The instant case actually asks this Court to decide whether or not ERISA provides a particular cause of action, i.e., for money damages against a nonfiduciary for participation in a fiduciary breach. When Congress considered and enacted the comprehensive, highly detailed provisions of ERISA, Congress carefully delineated the specific instances when nonfiduciaries can be liable and the remedies for and liabilities associated with those instances. Neither ERISA nor the legislative history of ERISA, nor subsequent regulations and legislation provide any support for the proposition that Congress intended to impose fiduciary duties or the concomitant liabilities on actuaries (or other nonfiduciary service providers). The legislative history of ERISA makes it clear that Congress fully considered who should be liable for what. That consideration encompassed the duties and liabilities of fiduciaries, as well nonfiduciaries, and the liabilities of those who participate in violations of ERISA.

While the legislative history of ERISA amply demonstrates a Congressional awareness of the law of trusts, that legislative history stresses that ERISA was intended to codify “certain principles”—not all the principles—of the law of trusts.⁵ The more the Petitioners in the instant case argue the obviousness of a cause of action under trust law against nonfiduciaries for participating in a fiduciary breach, the more obvious is the total absence of any hint of Congressional intent in the statute

⁵ “The fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts.” S. Rep. No. 127, 93d Cong., 1st Sess. (1973) reprinted in 1974 U.S.C.C.A.N. 4838, at 4865 (emphasis supplied).

or its legislative history—to permit this cause of action under federal law.

ERISA contains express private causes of action for damages (a) against a fiduciary for breaching his/her fiduciary duties and (b) against a fiduciary who participates in a breach of a cofiduciary. Those causes of actions can be asserted by plan fiduciaries; those causes of action cannot be asserted by actuaries, or by any party in interest who is not a fiduciary or a plan participant. The Department of Labor takes the position that to avoid being charged with participation in a breach of a cofiduciary, a fiduciary can sue the cofiduciary under ERISA. See 29 C.F.R. § 2509.75-5 at FR-10. The non-fiduciary party in interest has no standing under ERISA to bring such an action. To engraft a nonfiduciary participation in a breach theory onto ERISA would be to subject parties in interest to liability, where they lack the legal wherewithal to rectify the fiduciary breach complained of. This lack of mutuality is one more reason for this Court not to create a private cause of action that the Congress rejected.

CONCLUSION

Based on the foregoing, the American Society of Pension Actuaries respectfully urges the Court to affirm the decision below.

Respectfully submitted,

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